89-703

(1)

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TOMMY EWING,
Petitioner,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

*FRITZ G. FAERBER
JOHN P. KUJAWSKI
CHARLES R. SCANLON
6400 West Main Street
Suite 3A
Belleville, Illinois 62223
Attorneys for Petitioner

*Counsel of Record

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

27pp

QUESTION PRESENTED

Whether sufficient evidence to support a causal relationship between an employer's negligence and an employee's injury is to be determined as a matter of Federal law under the Federal Employers Liability Act, 45 U.S.C. Sec. 51, pursuant to the Supremacy clause, Article VI, Clause 2 of the United States Constitution.

PARTIES BELOW

The caption of the case in this Court contains the names of all the parties.

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No.

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TOMMY EWING,
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ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

COMES NOW Tommy Ewing, Petitioner, and respectfully prays that a writ of certiorari be issued to review the judgment of the Missouri Court of Appeals, Eastern District, filed May 2, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals, Eastern District, is reported at *Ewing v. St. Louis Southwestern Railway Company,* 772 S.W.2d 774 (Mo. App. 1989). It is reprinted in the appendix hereto, pp. A-1 - A-7, infra.

The Order of the trial judge in the Circuit Court for the Twenty-Second Judicial Circuit, State of Missouri, has not been reported. It is reprinted in the appendix hereto, pp. A-8 - A-7, infra.

The Order of the Court of Appeals, Eastern District, Denying Petitioner's Motion For Rehearig has not been reported. It is reprinted in the appendix hereto, p. A-9.

The Order of the Supreme Court of Missouri, Denying Petitioner's Motion To Transfer has not been reported. It is reprinted in the appendix hereto, p. A-10.

JURISDICTION

The judgment sought to be reviewed was filed in the Missouri Court of Appeals, Eastern District, on May 2, 1989. On May, 31, 1989, the Court of Appeals, Eastern District, entered its Order denying Petitioner's Motion For Rehearing or Alternatively, Transfer To The Supreme Court. On August 1, 1989, the Supreme Court of Missouri entered its Order denying Petitioner's application for transfer. Jurisdiction to review the judgment of the Missouri Court of Appeals, Eastern District, is conferred upon this Court by 28 U.S.C. Sec. 1257(3).

STATUTES INVOLVED

The statutory provision involved herein is 45 U.S.C. Sec. 51, which provides in pertinent part:

> "Every common carrier by railroad while engaging in commerce between any of the several states or territories...shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce...for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

STATEMENT OF THE CASE

Petitioner, Tommy Ewing, was injured while employed by the Respondent, St. Louis Southwestern Railway Co., as a traveling mechanic. As part of his duties, Ewing was required to perform repairs on Respondent's vehicles in the field. Respondent's policy was to repair disabled vehicles in the field wherein they became disabled, rather than tow them to a repair shop. Petitioner supplied his own tools to perform the work required.

On the date of his injury, Petitioner was sent to replace a clutch on a gang truck located on the parking lot of Respondent's depot. The surface of the parking lot where the disabled truck was located consisted of ballast, a rough, rocky surface. Petitioner laid cardboard on the ground when he was working underneath a vehicle on such a surface. Nevertheless, the rocks would pierce through the cardboard and cause Petitioner to work in extremely awkward positions.

Upon arriving on the scene, Petitioner attempted, but was unable, to contact other employees of Respondent to assist him. It was not unusual for a traveling mechanic to perform such work on his own, but some mechanics use a helper. In order to repair the clutch, Petitioner first removed the transmission with a boom. After replacing the clutch, Petitioner had to replace the transmission. Petitioner had to lie on the ground in an awkward position under the truck and use his body to physically push it into place. As he was tightening the final bolt on the transmission, Petitioner's wrench slipped, causing his left elbow to strike the ground forcefully. He immediately felt severe pain in his elbow. Shortly thereafter, while still under the truck, Petitioner felt pain in his lower back and legs. Those physical demands of working in an awkward position resulted in his injuries. After completing the job, Petitioner reported the incident to his employer.

Petitioner brought suit against Respondent pursuant to 45 U.S.C. Sec. 51 alleging that Respondent failed to provide a reasonably safe place in which to work, or a reasonably safe method of working. A jury returned a verdict assessing Plaintiff's damages at $512,000 and attributing 30% fault to Plaintiff, resulting in a net verdict for Plaintiff in the amount of $358,400.00. The trial judge entered a judgment notwithstanding the verdict in favor of Defendant and alternatively conditionally granting a new trial on the basis that the verdict was excessive.

On appeal, the Missouri Court of Appeals, Eastern District, affirmed the trial court's grant of judgment n.o.v. in favor of Defendant. In its opinion, the Court of Appeals held that, assuming that Respondent was negligent in placing Petitioner in an awkward position to perform his work, there was no causative link between any negligence of Respondent, and Plaintiff's injury. The Court of Appeals acknowledged in its opinion that "medical testimony established that [Petitioner] has a bulging disc in his lower back which his medical experts attributed to the accident." A-3. The Court further acknowledged that "[t]he incident which admittedly caused the elbow injury was the wrench slipping." A-6.

REASON FOR GRANTING THE WRIT

THE DECISION OF THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND THE UNITED STATES COURT OF APPEALS IN THAT THE MISSOURI COURT OF APPEALS IMPROPERLY APPLIED MISSOURI LAW, RATHER THAN FEDERAL LAW, IN DETERMINING THAT PETITIONER HAD FAILED TO ESTABLISH A CAUSAL LINK BETWEEN RESPONDENT'S NEGLIGENCE AND PETITIONER'S INJURY.

In its opinion, the Missouri Court of Appeals, Eastern District, held that the Petitioner failed to establish a causal link between the presumed negligence of Respondent and his injuries because Petitioner did not eliminate other potential causes of his injury. The Court of Appeals acknowledged that expert testimony was presented that working in a confined space, as Petitioner was required to do, can cause the type of injury Plaintiff suffered, A-6 and at least one of Petitioner's medical experts testified that Petitioner's back condition was attributable to the accident involving the wrench slipping. A-5. However, the Court of Appeals then concluded that it would be the "height of speculation" to conclude that, had the truck on which Plaintiff was working been taken to a shop for repairs, the injury would not have occurred. A-6. In so doing, the Court of Appeals placed the burden on Petitioner to exclude potential causes for his injury other than Respondent's negligence as a pre-requisite to recovery. This is an improper burden to place on a Plaintiff in an FELA case.

In *Rogers v. Missouri Pacific Railroad Company,* 352 U.S. 500, 1 L.Ed.2d 493, 77 S.Ct. 443, reh. denied 353 U.S. 943, 1 L.Ed.2d 764, 77 S.Ct. 808 (1957), this Court set forth the standard which governs both employer liability and the proper function of the trial judge in cases brought under the Federal Employers Liability Act (FELA), 45 U.S.C. Sec. 51:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer *played any part at all* in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other possibilities." 352 U.S. at 506-507; 1 L.Ed.2d at 499-500, 77 S.Ct. 443. [Emphasis added.)

The Missouri Court of Appeals' requirement that a Plaintiff negate all other potential causes of his injury is but a fallback to the "but for" test denounced in *Rogers*. By requiring that a Plaintiff exclude other potential causes, the Missouri Court of Appeals requires the Defendant's negligence be the sole proximate cause of the Plaintiff's injury. But, as *Rogers* holds, it is sufficient in order to impose liability that the employer's negligence played any part, *even the slightest,* in producing the employee's injury. 352 U.S. at 506. As this Court further observed in *Webb v. Illinois Central Railroad Co.,* 352 U.S. 512, 515, 1 L.Ed.2d 503, 506, 77 S.Ct. 451 (1957), a Plaintiff need not exclude all other possible causes of his injury in order to make a submissible case under FELA.[1] There need only be some evidence that the employer's negligence played a part,

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[1] But see *Funseth v. Great Northern Railway Co.,* 399 F.2d 918, 933 (9th Cir.), cert. denied, 393 U.S. 1083, 21 L.Ed.2d 775, 89 S.Ct. 865 (1969), upholding an instruction that provided that the "cause must be one without which the injury would not have occurred."

however small, in producing Plaintiff's injury. *Id.* Further, in determining whether there is sufficient evidence to submit the issue to a jury, the Court looks only at the evidence and inferences therefrom which tend to support the Plaintiff's case. *Wilkerson v. McCarthy,* 336 U.S. 53, 57, 93 L.Ed. 497, 502, 69 S.Ct. 413 (1949).

The Missouri Court of Appeals' reliance on *Kimmie v. Terminal Railroad Ass'n of St. Louis,* 66 S.W.2d 561 (Mo. 1933) displays the error of its analysis. In that case, which pre-dates the 1939 amendment to FELA, the Court applied common law negligence standards in finding a lack of a causative link between the negligence alleged and the Plaintiff's injury in an action brought under the Federal Boiler Inspection Act, 45 U.S.C. Sec. 23. The Plaintiff's medical expert in *Kimmie* testified that a cancerous tumor in Plaintiff's back, "might, would or could" be the result of a fall due to his employer's negligence. 66 S.W.2d at 564. In finding this testimony insufficient to establish a proximate cause, the Court noted that "...there was not here other ample evidence 'tending to exclude all other causes save the fall and to prove that the fall was the cause.' " *Id.*

It does not matter that Petitioner did not unequivocally establish that his injury would not have occurred had he been able to perform his job under different conditions, e.g., in a repair shop or with the aid of an assistant. An employee meets his burden under FELA when there is proof, even though entirely circumstantial, from which the jury may, with reason, infer that the employer's negligence played any part in causing the injury. *Rogers,* 352 U.S. at 500. As the Ninth Circuit noted in *Pierce v. Southern Pacific Transp. Co.,* 823 F.2d 13666, 1370 (9th Cir. 1987), "A jury's right to pass upon questions of fault and causation in FELA actions must be viewed liberally; the jury's power to engage in inferences is significantly broader than in common law negligence actions." See also *Ybarra v. Burlington Northern,* 689 F.2d 147, 149 (8th Cir. 1982). The

Ninth Circuit, in *Smith v. National R.R. Passenger Corp.*, 856 F.2d 467, 470 (9th Cir. 1988), takes a position diametrically opposed to that of the Missouri Court of Appeals:

> "The negligence of the Defendant cannot be excluded as one of the actual causes of the accident, unless it can be said *with certainty* that, even if the Defendant had not been negligent, the accident would nevertheless have happened. It is not enough to speculate "that the same harm might possibly have been sustained had the actor not been negligent." quoting Restatement of Tort, Sec. 432, Comment "C". (emphasis in original).

In setting aside an FELA jury verdict, the trial court improperly interfered with a right of Petitioner that is part and parcel of the remedy afforded under FELA. *Bailey v. Central Vermont Ry. Co.*, 319 U.S. 350, 354, 87 L.Ed. 1444, 1448, 63 S.Ct. 1115 (1943). The *Rogers* test of a submittable case under FELA has been called "[the] most lenient standard of proof." *Brown v. Baltimore and Ohio R.R. Co.*, 805 F.2d 1133, 1137 (4th Cir. 1986). "This low and liberal standard...works in favor of submission of issues to the jury in such cases rather than toward foreclosure through a directed verdict or judgment n.o.v." *Diebold v. Moore McCormack Bulk Transport Lines*, 805 F.2d 55, 58 (2nd Cir. 1986). A directed verdict or judgment n.o.v. is appropriate "only where there is a complete absence of probative facts" to support the verdict. *Lavender v. Kurn*, 327 U.S. 645, 653, 90 L.Ed. 916, 923, 66 S.Ct. 740 (1946); *Dennis v. Denver & Rio Grande Webster R.R. Co.*, 375 U.S. 208, 210, 11 L.Ed.2d 256, 258, 84 S.Ct. 291 (1963).

Given the Missouri Court of Appeals' recognition that there was evidence tending to show that Petitioner's back injury was caused by his accident while working on Respondent's truck, neither the trial court, nor the Court of Appeals was in a position to second guess the jury's determination that Respondent was negligent and that its negligence played a part in producing Petitioner's injury. The Court of Appeals condemns the jury

for speculating, but the jury has a duty to look at all of the evidence and draw from that evidence those inferences which it finds most reasonable. For, as the Court held in *Lavender v. Kurn,* "[w]henever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference." 327 U.S. at 653, 90 L.Ed. at 922, 66 S.Ct. 740.

Here, the Missouri Court of Appeals sanctioned the usurpation of the jury's function by the trial court, based upon the application of Missouri law of causation applicable to state law claims. The question of causation under FELA is one of Federal and not State law. Under FELA, the question of what constitutes negligence, see *Urie v. Thompson,* 337 U.S. 163, 174, 93 L.Ed. 1282, 1295, 69 S.Ct. 1018 (1949), and the proper measure of damages, see *Chesapeake & Ohio Ry. Co. v. Kelly,* 241 U.S. 485, 491, 60 L.Ed. 1117, 1123, 36 S.Ct. 630 (1916), is a matter of Federal, not State law. The Missouri Court of Appeals' decision conflicts with those decisions cited herein from which the body of FELA has developed. Those cases demonstrate the importance which this Court has attached to maintaining uniformity in Courts throughout the nation in administering FELA. The Missouri Court of Appeals' decision is yet another in a series of decisions by Missouri Courts demonstrating those Courts' refusal to apply the proper body of substantive law, Federal law, in a Federal Employers Liability Act case, see, *Norfolk & Western Railway Company v. Leipert,* 444 U.S. 490, 62 L.Ed.2d 689, 100 S.Ct. 755, reh. denied, 445 U.S. 972, 64 L.Ed.2d 250, 100 S.Ct. 1667; *St. Louis Southwestern Ry. Co. v. Dickerson,* 470 U.S. 409, 84 L.Ed.2d 303, 105 S.Ct. 1347 (1985). This Court should grant certiorari to reverse the decision of the Missouri Court of Appeals, and reverse its decision as inconsistent with the remedy afforded by FELA.

CONCLUSION

For the foregoing reasons, the Petition For Writ of Certiorari should be granted.

*FRITZ G. FAERBER
JOHN P. KUJAWSKI
CHARLES R. SCANLON
6400 West Main Street
Suite 3A
Belleville, Illinois 62223

Attorneys for Petitioner

*Counsel of Record

APPENDIX

APPENDIX A

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DIVISION FOUR

Nos. 54484 and 54485

Tommy Ewing,
(Plaintiff)Appellant/Cross-Respondent,

v.

St. Louis Southwestern Railway Company, a corporation,
(Defendant)Respondent/Cross-Appellant.

Appeal from the Circuit Court of the City of St. Louis

Hon. Michael Godfrey, Judge

OPINION FILED: May 2, 1989

This case reaches us on consolidated appeals by both parties. Plaintiff appeals from the trial court order granting defendant's motion for judgment notwithstanding the verdict and alternatively conditionally granting a new trial on the basis that the verdict was excessive. Defendant appeals from the trial court's failure to grant a new trial on additional grounds. We affirm the trial court's order granting judgment notwithstanding the verdict.

The action was brought under the Federal Employers' Liability Act (FELA). Plaintiff is a traveling mechanic for defendant employed in Arkansas. His job encompasses servicing equipment of the defendant in the field. He is supplied with a truck having a boom and he furnishes his own tools. On the date of his injury he was dispatched to replace a clutch in a company gang truck. The truck was located on a parking lot next to defendant's depot and the parking lot was part of the railroad's property. The parking lot was surfaced with ballast giving it a

rocky surface. Plaintiff utilized cardboard to protect himself from the rocky surface, but rocks would still make it uncomfortable for plaintiff when he was lying on the ground under the truck. Replacing a clutch on a truck is a usual part of the job of a traveling mechanic and plaintiff had performed that task on prior occasions. It is also not unusual for such repairs to be made on less than ideal surfaces similar to that involved here.

When plaintiff arrived at the scene, he attempted to locate members of the right-of-way maintenance gang to assist him but the gang was apparently out of range of plaintiff's radio. Plaintiff proceeded to do the job by himself. The job is one frequently performed by a single mechanic but some mechanics prefer having a helper. That determination is up to the mechanic. In order to perform the repair it is necessary to remove the transmission of the truck in order to reach the clutch. Plaintiff used the boom to remove the transmission and replaced the clutch, all without incident. It was then necessary for him to replace the transmission and bolt it into position. To replace the transmission plaintiff had to physically push it into position while lying on the ground under the truck. This he also accomplished without any indication of injury. Plaintiff replaced the bolts and as he was aggressively tightening the final bolt his wrench slipped causing his left elbow to strike the ground forcefully. He felt immediate severe pain in his elbow and shortly thereafter, while still under the truck, began to experience pain in his lower back and legs. He completed the job and then returned to his home base and reported the incident. He did not know what caused the wrench to slip but wrenches do from time to time slip for various reasons while being utilized by exprienced mechanics such as plaintiff.

Plaintiff obtained medical treatment for his elbow and back. He had broken his elbow several years earlier and the major treatment to the elbow was to repair damage from that prior break which treatment would have been necessary eventually regardless of the injury incurred while changing the clutch.

Medical testimony established that he has a bulging disc in his lower back which his medical experts attributed to the accident. His experts were unable to make a prognosis of the level of difficulty he might experience in the future from the bulging disc other than that he would on occasions have pain. He lost $12,000 in wages from the accident. There was no evidence of any other special damages. He is presently employed in the same job. He has sufficient seniority that if he desired to work as a mechanic in defendant's shop in Pine Bluff he could do so, but for personal reasons he prefers to continue as a traveling mechanic. The jury assessed plaintiff's damages at $512,000 and attributed 30% of the fault to plaintiff for a total award to plaintiff of $358,400.

In *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443 (1957) the Supreme Court set forth the scope of appellate review in FELA cases as follows:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." 77 S.Ct. 443 at [6-8].

Nevertheless, an employee's case, to be submissible under FELA must include all the same elements as are found in a common-law negligence action. *Davis v. Burlington Northern, Inc.*, 541 F.2d 182 (8th Cir. 1976) [1-3]. That includes causation although, as *Rogers* indicates, in FELA the causation require-

ment is modified so that if the railroad's negligence is the slightest cause of the injury liability is established. There must therefore be evidence to connect the injury to some negligent conduct of the defendant.

Plaintiff contends here that the railroad failed to provide plaintiff with a safe place to work and a reasonably safe method to do the work. He hypothesizes several possibilities of things the defendant could and should have done to make the job safer, i.e., bring the truck to the Pine Bluff shop 100 miles away to make the repair, not require the work to be performed on a rocky parking lot, provide additional help in doing the work, provide a transmission jack to spot the transmission. If for purposes of this case we assume *arguendo* that any or all of these items demonstrate negligence we are still left with no causative link, even the slightest, to the injury plaintiff sustained.

Plaintiff testified that he had no problems with his back until after the wrench slipped. There was no medical testimony that the back injury had its origin prior to the wrench slipping. The elbow injury clearly occurred solely because the wrench slipped. In the history given to one doctor plaintiff stated that "he was working under a truck when a wrench slipped and he struck his left elbow against the ground. He was changing the transmission in a truck, and working in an awkward position and lifting. He believes he injured his back at the same time." The doctor testified that "*that activity* as he provided the history of" could have aggravated the normal degenerative changes in plaintiff's back. Which activity the doctor was referring to was not established nor did the doctor state that plaintiff's back condition was in fact caused by any activity prior to the wrench incident. At the time the wrench slipped, plaintiff was not lifting the transmission, he was pulling on the wrench with his back raised from the ground in order to obtain the torque he desired. A second doctor was given a hypothetical question "whether or not these conditions were caused by the incident when he was working under the transmission when he was pushing against

the transmission and when he was pulling on the wrench and his elbow slipped ... ." The doctor responded "that the incident that I described to you when he was under the truck did cause the muscle damage, the ligament damage, the nerve damage, and the bulging disk. It also caused the elbow problem, but again that's not what I'm treating." The incident which admittedly caused the elbow injury was the wrench slipping. The doctor did state later that lying in an awkward position and pushing a transmission can cause a herniated disk and muscle damage depending on the exertion involved. He did not testify that such activity caused plaintiff's back problems. Assurance of possibilities of causation is not, of itself, sufficient to make a submissible case upon the issue of cause and effect. *Kimmie v. Terminal R.R. Ass'n. of St. Louis,* 334 Mo. 596, 66 S.W.2d 561 (1933) [9-11].

The evidence did not establish any cause for the two injuries plaintiff sustained other than the wrench slipping. All of plaintiff's pain followed that occurrence, none preceded it.

Plaintiff did not know what caused the wrench to slip. He did give several possibilities, none of them involving negligence by the railroad. He did not attribute the slipping of the wrench to the position he was in, to the condition of the parking lot, or to the conditions under which he was working. The tightening of the bolts was in a space where only one person could work so additional help would not have affected the accident. He testified that the transmission was already placed and secured when the wrench slipped so a jack would have made no difference. He also testified that he would have been in the same position doing the same thing in the shop. It is the height of speculation to conclude that being in the shop would have made any difference.

Plaintiff suffered a job-related accident. Congress has chosen to impose liability for such accidents against the employer only when the injury is the result of some negligence

on the employer's part. It has not chosen to utilize the approach taken by the states under Workers' compensation statutes. *Rogers, supra.* 77 S.Ct. [11-16]. Plaintiff did not establish that his injury was the result of any negligence on defendant's part. The trial court correctly entered judgment notwithstanding the verdict. In view of this finding it is unnecessary for us to address the other issues raised.

Judgment affirmed.

/s/ Gerald M. Smith,
Presiding Judge

Stephan, J; Staz, J.; Concur

APPENDIX B

MISSOURI CIRCUIT COURT

TWENTY-SECOND JUDICIAL CIRCUIT

(St. Louis City)

Cause No. 852-00490

Division No. 12

Tommy Ewing,
Plaintiff,

vs.

St. Louis Southwestern Railway Company, a corporation,
Defendant.

ORDER

This cause having been tried in this division and the jury having found in favor of plaintiff and against defendant and thereafter said defendant having filed it's Post-Trial Motion, incorporating therein a motion for judgment notwithstanding the verdict and a motion for a new trial, and the same having been presented to the Court and argued, and the parties having been granted leave to file memoranda of law, and after the filing of the last brief the cause and the motions having been taken under submission by the Court, and the Court now being fully advised in the premises, it is the ORDER of the Court that said Post-Trial Motion (motion for judgment, notwithstanding the verdict) must be, and the said motion accordingly is, sustained, and the judgment heretofore entered in this cause in favor of plaintiff and against defendant hereby is set aside, vacated and for naught held, and judgment hereby is entered in this cause in favor of defendant and against the plaintiff for the reason and on the grounds stated and set forth in Part II, Paragraph 1 of said motion for judgment notwithstanding the verdict. (POST-

TRIAL MOTION). See: *Vinson v. Vinson,* 725 S.W.2d 121, 123 (Mo.App. E.D. 1987).

In the event the above order of the Court and the judgment contained therein is vacated or reversed by an appellate court (Rule 72.01(c)) then and in that event the defendant's motion for a new trial is granted for the reason and on the grounds stated and set forth in Part III, Paragraphs 11 and 12 of said motion for new trial. (POST-TRIAL MOTION). See Rule 78.02; *Combs v. Combs,* 295 S.W.2d 78, 80 [3-8] (Mo. 1956); *Demmos v. St. Louis Outdoor Advertising, Inc.,* 452 S.W.2d 303, 307(5) (Mo.App. E.D. 1970).

It is further ordered that the costs herein be taxed against plaintiff.

SO ORDERED:

/s/ Michael F. Godfrey
Judge

Dated: 2/5/88

cc: Mr. Fritz G. Faerber
Mr. John B. Gunn

APPENDIX C

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

To: Attorney of Record Page: 1 of 1

From: Deirdre O. Ahr, Clerk Date: May 31, 1989

Re: MOTIONS FOR REHEARING AND/OR TRANSFER TO SUPREME COURT DENIED

1.		54485	Ewing, Tommy, App.
		vs.	St. Louis Southwestern Railway Co., Resp.
	2.	55158	State of Missouri, Resp.
		vs.	Shelton, Stacy, App.
	3.	55316	Jones, James, App.
		vs.	State of Missouri, Resp.
	4.	55365	Jamerson, Melvin Lee, App.
		vs.	State of Missouri, Resp.
	5.	55367	Glass, Theodore L., App.
		vs.	State of Missouri, Resp.
	6.	55368	Jackson, Johnnie Lee, App.
		vs.	State of Missouri, Resp.
	7.	55408	Taylor, Sammie Davis Jr., App.
		vs.	State of Missouri, Resp.
	8.	55652	Robinson, Terrell, App.
		vs.	State of Missouri, Resp.

APPENDIX D

IN THE SUPREME COURT OF MISSOURI

No. 71786

E.D. Nos. 54484 and 54485

May Session, 1989

Tommy Ewing,
(Plaintiff) Appellant/Cross-Respondent,

vs. TRANSFER

St. Louis Southwestern Railway Company, etc.,
(Defendant) Respondent/Cross-Appellant.

Now at this day, on consideration of (Plaintiff) appellant/Cross-Respondent's Application to transfer the above entitled cause from the Eastern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1989, and on the 1st day of August, 1989, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 1st day of August, 1989.

/s/ Thomas F. Simon, Clerk

/s/ Kathleen Blanton, D.C.

Supreme Court, U.S.
FILED
NOV 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-703

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TOMMY EWING,
Petitioner,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

*JOHN B. GUNN
LESLIE G. OFFERGELD
WALKER & WILLIAMS, P.C.
Belleville, Illinois 62223
(618) 277-1000; 274-1000
Attorneys for Respondent

*Counsel of Record

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

QUESTION PRESENTED

THE STATE INTERMEDIATE APPELLATE COURT EXPRESSLY FOLLOWED *ROGERS VS. MISSOURI PAC. R. CO.* (1957) 352 U.S. 500 IN AFFIRMING THE STATE TRIAL COURT'S JUDICIAL APPRAISAL OF THE EVIDENCE.

Whether this court should exercise its discretionary jurisdiction to review evidence and discuss specific facts where the findings of fact made by the State Trial Court receive the concurrence of the State Intermediate Court of Appeals.

PARTIES BELOW

The parent company of the Respondent, St. Louis Southwestern Railway Co., is the Southern Pacific Transportation Company.

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No. 89-703

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TOMMY EWING,
Petitioner,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

STATEMENT OF THE CASE

Petitioner, Tommy Ewing, was employed as a travelling mechanic for the Respondent, St. Louis Southwestern Railway Company. The Petitioner's duties as a travelling mechanic involved repairing equipment in the field. On the date of his injury, Petitioner was to replace a clutch on a gang truck located on a parking lot which was surfaced with ballast. Replacing a clutch on a gang truck was a usual part of Petitioner's job and he had performed that task on prior occasions on less than ideal surfaces similar to the parking lot involved here.

The Petitioner furnished his own tools and equipment to do the work. He was supplied with a truck having a boom. In order to perform the repairs on the date of the incident, the

Petitioner first had to remove the transmission to get to the clutch. He used the boom on his truck to remove the transmission and replace the clutch, all without incident. Then, he went underneath the truck to spot the transmission. This portion of the job was also performed without incident.

After the transmission was spotted, the Petitioner began tightening the bolts which secured the transmission to the bellhousing. There was only room enough for one person underneath the truck to tighten the bolts. The Petitioner was lying underneath the truck on a piece of cardboard which he had brought with him. While tightening the last bolt, Petitioner's wrench slipped causing his left elbow to strike the ground. At the time the wrench slipped, Petitioner was pulling on it with his back raised off the ground to obtain the torque he desired. The Petitioner would have been in that same position tightening the bolt in the same manner regardless of whether he had the use of a transmission jack, a concrete floor, additional help or a creeper beforehand. (A-5)

Petitioner testified that he did not have any problems with his back up until the time the wrench slipped. Minutes after the wrench slipped, he began experiencing pain in his lower back and legs while still underneath the truck. The medical testimony at trial established that Petitioner suffered his back and elbow injuries at the same time or after the wrench slipped. Petitioner, an experienced mechanic, did not know why the wrench slipped.

Following a jury verdict in favor of the Petitioner, the trial court entered judgment notwithstanding the verdict in favor of the Respondent which was affirmed on appeal by the Eastern District, Missouri Court of Appeals by unanimous decision. In its opinion, the Court of Appeals held that assuming *arguendo* that Respondent was negligent in not bringing the truck to the Pine Bluff shop 100 miles away to make the repair, not requiring the work to be performed on a rocky parking lot, not providing additional help or a transmission jack, there was still no

causative link, even in the slightest, to the injuries Petitioner sustained. (A-4) The reason for his holding was that at the time the wrench slipped, none of those items would have made any difference. (A-5) Petitioner would have been in the same position at that time doing the same thing as he would have been in the shop where those items were available. (A-5)

SUMMARY OF ARGUMENT

1. The opinion of the State Intermediate Appellate Court does not conflict with any decision of this Court under the Federal Employer's Liability Act. Rather, the State Intermediate Appellate Court expressly followed *Rogers vs. Missouri Pac. R. Co.* (1957) 352 U.S. 500 in affirming the State Trial Court's judicial appraisal of the evidence.

2. The decision below consists solely of a judicial appraisal of the proofs presented at trial. This court must not grant certiorari merely to review evidence that has already been reviewed by two lower courts and found by unanimous decision to be insufficient to support a jury verdict.

ARGUMENT

I. THE STATE INTERMEDIATE APPELLATE COURT EXPRESSLY FOLLOWED *ROGERS VS. MISSOURI PAC. R. CO.* (1957) 352 U.S. 500 IN AFFIRMING THE STATE TRIAL COURT'S JUDICIAL APPRAISAL OF THE EVIDENCE.

The Petitioner exaggerates the import of the Eastern District, Missouri Court of Appeals' holding in this case. Contrary to Petitioner's assertion, the Court of Appeals did not place the burden on him to exclude all other possible causes of his injuries besides the Respondent's negligence. Rather, it merely held that the Petitioner did not sustain his burden of proof that *some* negligence on the part of Respondent contributed even in the slightest, to the injuries complained of. In so holding, the Court of Appeals expressly cited and enforced the governing rules setting forth the scope of appellate review in Federal Employer's Liability Act (45 U.S.C. Sec. 51) cases as laid down by this court in *Rogers vs. Missouri Pacific Railroad Co.* (1957) 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 as follows:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer's negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is present is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." (352 U.S. at 506-507; 77 S.Ct. 443, 1 L.Ed.2d at 499-500) (A-3)

II. WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW EVIDENCE AND DISCUSS SPECIFIC FACTS WHERE THE FINDINGS OF FACT MADE BY THE STATE TRIAL COURT RECEIVE THE CONCURRENCE OF THE STATE INTERMEDIATE COURT OF APPEALS.

The facts and reasons for the Court of Appeals affirmance of the judgment notwithstanding the verdict are fully and accurately set forth in the opinion of the court: The evidence did not establish any cause for the two injuries Petitioner sustained other than the wrench slipping. (A-5) Moreover, the evidence failed to establish any reason why the wrench slipped in the first place. (A-2, 5) Because of the woeful lack of evidence as to the cause of the wrench slipping, the Petitioner allowed the jury to engage in the wildest of speculation by introducing testimony concerning the absence of a creeper, a transmission jack or a concrete floor such as were available in the Pine Bluff shop with which to do his work. (A-5) However, the Petitioner did not sustain his burden of proof that the failure to furnish any of those items was causally connected, even in the slightest, with his claimed accident. (A-4) Even under the Federal Employer's Liability Act, mere speculation cannot supply the place of probative facts. *Tennant vs. Peoria and Pekin Union Ry. Co.* (1943) 321 U.S. 29, 32-33; 64 S.Ct. 409; 88 L.Ed. 520, 524.

At the time of the accident, Petitioner was performing a very ordinary function of his job as a travelling mechanic in placing a wrench on the head of a bolt and tightening it. (A-2) The slipping of the wrench was not attributed to the conditions under which Petitioner was working nor to the failure to furnish any particular piece of equipment or additional help. (A-5) The evidence was undisputed that Petitioner would have been in the same position on his back underneath the truck tightening the bolt in the same manner regardless of whether he was in the shop or out in the field. (A-5)

The portions from the opinion below cited in support of the Petition for Writ of Certiorari relate solely to the fact that Petitioner suffered an injury in the course of his work as a mechanic. Employer negligence under the FELA, however, is not presumed merely by proving an injury. *Nivens vs. St. Louis Southwestern Ry. Co.* (5th Cir. 1970) 425 F.2d 114, 118, *Cert. Den.*, 400 U.S. 879; 91 S.Ct. 121; 27 L.Ed.2d 116. The Act does not make the employer an insurer against injuries suffered by its employees. *Inman v. Baltimore and Ohio R. Co.* (1959) 361 U.S. 138 140; 80 S.Ct. 242; 4 L.Ed.2d 198, 201.

The Petitioner is correct that there are numerous cases decided by this Court stating that the standard under the FELA is liberal in favor of submission of the issues to the jury. Nonetheless, other opinions of the court clearly indicate that there must still be a judicial appraisal as to the sufficiency of evidence to support a jury verdict. See, e.g., *Inman vs. Baltimore and Ohio R. Co., supra; Herdman vs. Pennsylvania R. Co.* (1957) 352 U.S. 518, 77 S.Ct. 455, 1 L.Ed.2d 508; *N.Y., N.H. and Hartford R. Co. vs. Henagan* (1960) 364 U.S. 441; 81 S.Ct. 198; 5 L.Ed.2d 183. In the instant case, the Court of Appeals did not substitute its own inferences from the evidence for those of the jury nor did it apply its own conception of the causation requirement as suggested by the Petitioner. Rather, after judicial appraisal of the proofs, it determined that there was simply no evidence to provide a rational basis for the jury to conclude that any negligence of the Respondent contributed, in the slightest, to Petitioner's injuries. (A-4, 5-6) This Court must not waste its resources by reviewing evidence that has already been reviewed by two lower courts and found by unanimous decision to be insufficient to support a jury verdict. See e.g., *United States vs. Johnson,* 268 U.S. 220, 227 (1925); *Graver Mfg. Co. vs. Linde Co.,* 336 U.S. 271, 275 (1949).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

*JOHN B. GUNN
LESLIE G. OFFERGELD
WALKER & WILLIAMS, P.C.
4343 West Main Street
Belleville, Illinois 62223
(618) 277-1000; 274-1000

Attorneys for Respondent

*Counsel of Record

APPENDIX

APPENDIX A

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DIVISION FOUR

Nos. 54484 and 54485

Tommy Ewing,
(Plaintiff)Appellant/Cross-Respondent,

v.

St. Louis Southwestern Railway Company, a corporation,
(Defendant)Respondent/Cross-Appellant.

Appeal from the Circuit Court of the City of St. Louis

Hon. Michael Godfrey, Judge

OPINION FILED: May 2, 1989

This case reaches us on consolidated appeals by both parties. Plaintiff appeals from the trial court order granting defendant's motion for judgment notwithstanding the verdict and alternatively conditionally granting a new trial on the basis that the verdict was excessive. Defendant appeals from the trial court's failure to grant a new trial on additional grounds. We affirm the trial court's order granting judgment notwithstanding the verdict.

The action was brought under the Federal Employers' Liability Act (FELA). Plaintiff is a traveling mechanic for defendant employed in Arkansas. His job encompasses servicing equipment of the defendant in the field. He is supplied with a truck having a boom and he furnishes his own tools. On the date of his injury he was dispatched to replace a clutch in a company gang truck. The truck was located on a parking lot next to defendant's depot and the parking lot was part of the railroad's property. The parking lot was surfaced with ballast giving it a

rocky surface. Plaintiff utilized cardboard to protect himself from the rocky surface, but rocks would still make it uncomfortable for plaintiff when he was lying on the ground under the truck. Replacing a clutch on a truck is a usual part of the job of a traveling mechanic and plaintiff had performed that task on prior occasions. It is also not unusual for such repairs to be made on less than ideal surfaces similar to that involved here.

When plaintiff arrived at the scene, he attempted to locate members of the right-of-way maintenance gang to assist him but the gang was apparently out of range of plaintiff's radio. Plaintiff proceeded to do the job by himself. The job is one frequently performed by a single mechanic but some mechanics prefer having a helper. That determination is up to the mechanic. In order to perform the repair it is necessary to remove the transmission of the truck in order to reach the clutch. Plaintiff used the boom to remove the transmission and replaced the clutch, all without incident. It was then necessary for him to replace the transmission and bolt it into position. To replace the transmission plaintiff had to physically push it into position while lying on the ground under the truck. This he also accomplished without any indication of injury. Plaintiff replaced the bolts and as he was aggressively tightening the final bolt his wrench slipped causing his left elbow to strike the ground forcefully. He felt immediate severe pain in his elbow and shortly thereafter, while still under the truck, began to experience pain in his lower back and legs. He completed the job and then returned to his home base and reported the incident. He did not know what caused the wrench to slip but wrenches do from time to time slip for various reasons while being utilized by experienced mechanics such as plaintiff.

Plaintiff obtained medical treatment for his elbow and back. He had broken his elbow several years earlier and the major treatment to the elbow was to repair damage from that prior break which treatment would have been necessary eventually regardless of the injury incurred while changing the clutch.

Medical testimony established that he has a bulging disc in his lower back which his medical experts attributed to the accident. His experts were unable to make a prognosis of the level of difficulty he might experience in the future from the bulging disc other than that he would on occasions have pain. He lost $12,000 in wages from the accident. There was no evidence of any other special damages. He is presently employed in the same job. He has sufficient seniority that if he desired to work as a mechanic in defendant's shop in Pine Bluff he could do so, but for personal reasons he prefers to continue as a traveling mechanic. The jury assessed plaintiff's damages at $512,000 and attributed 30% of the fault to plaintiff for a total award to plaintiff of $358,400.

In *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443 (1957) the Supreme Court set forth the scope of appellate review in FELA cases as follows:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." 77 S.Ct. 443 at [6-8].

Nevertheless, an employee's case, to be submissible under FELA must include all the same elements as are found in a common-law negligence action. *Davis v. Burlington Northern, Inc.*, 541 F.2d 182 (8th Cir. 1976) [1-3]. That includes causation although, as *Rogers* indicates, in FELA the causation require-

ment is modified so that if the railroad's negligence is the slightest cause of the injury liability is established. There must therefore be evidence to connect the injury to some negligent conduct of the defendant.

Plaintiff contends here that the railroad failed to provide plaintiff with a safe place to work and a reasonably safe method to do the work. He hypothesizes several possibilities of things the defendant could and should have done to make the job safer, i.e., bring the truck to the Pine Bluff shop 100 miles away to make the repair, not require the work to be performed on a rocky parking lot, provide additional help in doing the work, provide a transmission jack to spot the transmission. If for purposes of this case we assume *arguendo* that any or all of these items demonstrate negligence we are still left with no causative link, even the slightest, to the injury plaintiff sustained.

Plaintiff testified that he had no problems with his back until after the wrench slipped. There was no medical testimony that the back injury had its origin prior to the wrench slipping. The elbow injury clearly occurred solely because the wrench slipped. In the history given to one doctor plaintiff stated that "he was working under a truck when a wrench slipped and he struck his left elbow against the ground. He was changing the transmission in a truck, and working in an awkward position and lifting. He believes he injured his back at the same time." The doctor testified that "*that activity* as he provided the history of" could have aggravated the normal degenerative changes in plaintiff's back. Which activity the doctor was referring to was not established nor did the doctor state that plaintiff's back condition was in fact caused by any activity prior to the wrench incident. At the time the wrench slipped, plaintiff was not lifting the transmission, he was pulling on the wrench with his back raised from the ground in order to obtain the torque he desired. A second doctor was given a hypothetical question "whether or not these conditions were caused by the incident when he was working under the transmission when he was pushing against

the transmission and when he was pulling on the wrench and his elbow slipped ... ." The doctor responded "that the incident that I described to you when he was under the truck did cause the muscle damage, the ligament damage, the nerve damage, and the bulging disk. It also caused the elbow problem, but again that's not what I'm treating." The incident which admittedly caused the elbow injury was the wrench slipping. The doctor did state later that lying in an awkward position and pushing a transmission can cause a herniated disk and muscle damage depending on the exertion involved. He did not testify that such activity caused plaintiff's back problems. Assurance of possibilities of causation is not, of itself, sufficient to make a submissible case upon the issue of cause and effect. *Kimmie v. Terminal R.R. Ass'n. of St. Louis,* 334 Mo. 596, 66 S.W.2d 561 (1933) [9-11].

The evidence did not establish any cause for the two injuries plaintiff sustained other than the wrench slipping. All of plaintiff's pain followed that occurrence, none preceded it.

Plaintiff did not know what caused the wrench to slip. He did give several possibilities, none of them involving negligence by the railroad. He did not attribute the slipping of the wrench to the position he was in, to the condition of the parking lot, or to the conditions under which he was working. The tightening of the bolts was in a space where only one person could work so additional help would not have affected the accident. He testified that the transmission was already placed and secured when the wrench slipped so a jack would have made no difference. He also testified that he would have been in the same position doing the same thing in the shop. It is the height of speculation to conclude that being in the shop would have made any difference.

Plaintiff suffered a job-related accident. Congress has chosen to impose liability for such accidents against the employer only when the injury is the result of some negligence

on the employer's part. It has not chosen to utilize the approach taken by the states under Workers' compensation statutes. *Rogers, supra.* 77 S.Ct. [11-16]. Plaintiff did not establish that his injury was the result of any negligence on defendant's part. The trial court correctly entered judgment notwithstanding the verdict. In view of this finding it is unnecessary for us to address the other issues raised.

Judgment affirmed.

/s/ Gerald M. Smith,
Presiding Judge

Stephan, J; Satz, J.; Concur